

Information Working Group 21st April 2009

Recast of Regulation 1049/2001

Council Sec (chairing) stated that delegations would be asked to give their views on Articles 2 and 3 of the Cion recast, together with the EP amendments which had been identified as falling within the scope of Article 255 TEC and the recast.

Article 2(1)

A number of Member States ([REDACTED]) stated that Article 2(1) of the recast goes beyond the scope of Article 255.

[REDACTED] supported the extension of the scope of Art 2(1).

Other Member States who had previously expressed a view were taken to adhere to their stated positions.

Comment: MS's supporting Article 2(1) did not explain how they thought it was compatible with Article 255

Cion stated that their approach was a practical one. They accepted that it was outside the scope of Article 255.

Council Sec summed up by saying that the Council was still clearly divided on this issue.

Article 2(5)

Several MS ([REDACTED]) stated that Regulation 1049/2001 does not conflict/circumvent the Courts rules of procedure, and supported the amendment from FIN/LITH & SLOV (identical to the EP's) to delete Article 2(5).

[REDACTED] & UK* supported Article 2(5).

[REDACTED] repeated their support for excluding legal advice from scope.

[REDACTED] asked if there was a potential conflict between Article 2(5) and Article 5(1).

[REDACTED] proposed an amendment to Article 2(5) to add the words

'and to documents submitted to the institutions in court proceedings'

to the end of the Cion draft of Article 2(5). This is to cover the situation where the Cion receives pleadings either as a party to the proceedings, or when it is copied in to the proceedings, for example when the litigation concerns a piece of Cion legislation.

Comment: I would appreciate any thoughts on the [REDACTED] proposal.

*UK noted that it needed clarification of whether Article 2(5) applied to pleadings from all courts, or was confined to Community Courts. The UK could see the Cion's reasoning on the rules of Community courts, but if it applied to all courts we would need to hear the Cion's reasoning for this.

UK supported the principle of a significant level of protection for legal advice, and the amendment to Article 2(5) achieved this. Also noted general Parliamentary reserve.

[REDACTED] also asked for clarification on whether Article 2(5) applied to all courts. [REDACTED] supported the principle of the [REDACTED] proposal to protect legal advice, but were unclear if inclusion in Article 2(5) was the correct approach.

[REDACTED] wanted to express support for protection of legal advice.

[REDACTED] and [REDACTED] opposed excluding legal advice from scope.

Cion stated that Article 2(5) was intended to apply to all courts, not just Community courts. The Cion's view is that if the courts themselves do not have rules on public access, it would be improper to circumvent this.

In response to [REDACTED] the Cion stated that it had received very few requests for disclosure of court pleadings, and these had been refused using the exceptions in Article 4 of the Regulation. But in view of the restrictive interpretation of the exceptions taken by the ECJ, the Cion was not confident that it could continue to deal effectively with application on this basis.

Article 2(6)

[REDACTED] had instructions to raise concerns about the second sentence of Article 2(6), whether the reference to 'information gathered or obtained from natural or legal persons' would exclude information submitted by national authorities and judges under the Community's competition legislation (Council Reg 1/2003).

[REDACTED] wanted the Cion and CLS to consider the impact of Reg 1049/2001 on Regulation 1/2003 in particular. [REDACTED] also wanted consideration given to the impact of Reg 1049/2001 on *lex specialis* generally.

[REDACTED] stated that it was a crucial question for them to retain a case by case analysis. They were prepared to look at the exceptions in Article 4(3) and the temporal element to try to address the Cion's problems with workload.

raised 3 points:

(i) they asked for clarification as to whether the definition of 'investigation' in Article 2(6) included infringement proceedings;

(ii) they also wanted a reference at the start of Article 2(6) that this was without prejudice to the *lex specialis*, data protection rules and other provisions should be explicitly referred to, for example inserting '*inter alia, rules in state aid and anti-trust cases*'.

(iii) they also want the focus to be on the content rather than the source of the information, and wanted to exclude information which has sensitive personal content (i.e. information on taxes) irrespective of the source. therefore proposed amending the second sentence of Article 2(6) as follows:

'Documents concerning information gathered or obtained from natural or legal persons by an institution in the framework of such investigation shall not be accessible to the public.'

Comment: I would be grateful for views on these proposals in due course.

and asked for clarification of whether infraction proceedings would be within Article 2(6). suggested including this as an explicit reference in Article 2(6).

and supported the amendment to delete Article 2(6) (identical to the EP amendment). was prepared to consider solutions to the Cion's problems on live investigations, but supported the proposal. They were aware of the need to protect information in competition cases, but believe the existing Regulation is working well.

supported Article 2(6) as drafted by the Cion. would need to consider the proposals.

UK suggested that Cion and CLS should consider the issue of *lex specialis*, and would like to consider the proposal. did not support proposal to delete Article 2(6), as this would require additional resources for the Cion which was unrealistic, particularly in the current economic climate.

Cion stated that most MS understood the Cion's rationale. The Regulation had been used massively by law firms to obtain information on ongoing investigations, but had nothing to do with citizen's rights of access. The issue was not one of resources, but the need to strike a balance between the Cion's role investigating breaches, and the right of access to docs.

Cion understanding was that the various *lex specialis* did not derogate from Regulation 1049/2001, but had to be interpreted in accordance with them. There were approx 120 *lex specialis* in force in 2001 and it would be very confusing for citizens if these were exempt from the Regulation.

On infractions, the Cion consider that infractions and state aid cases are covered by the first limb of Article 2(6).

It is not clear that they will fall under the second limb of Article 2(6) as they are not acts of individual scope.

Council Sec concluded that the outcome of discussions on Article 2(5) and 2(6) is not yet clear.

Article 3

[REDACTED] supported the [REDACTED] proposed amendment to Article 3(a)

[REDACTED] asked the Cion for clarification of what is meant by 'formally transmitted' in the recast proposal.

UK said [REDACTED] amendment was interesting, we were considering it, and would welcome the Cion's thoughts. In the meantime we would reserve our position.

[REDACTED] supported the Cion's proposal on Article 3 (**Comment** – the first and only MS to do so).

There was no discussion of the EP amendment to Article 3.

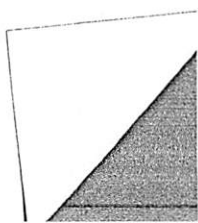
Cion stated that they wanted to define when a 'document' was created.

'Formally transmitted' meant once the document had been transmitted to a recipient, it would be a 'document'. Drafts circulated for comment or contributions, or once it had been sent to an internal or external recipient, it would be a 'document'. The intention is that once a document has been finalised it will fall within the definition of a 'document'.

'Otherwise registered' refers to documents which are finalised but not transmitted. These are placed on the file, but would still be classified as a 'document' once it has been finalised.

In terms of the database, anything which is held on the database, if it could be retrieved it will constitute a 'document'.

Cion stated that they would look again at the drafting of the definition of 'document' in Article 3.



Comment: Do we want to support the [REDACTED] amendment, or wait to see what (if anything) the Cion present by way of an amendment to Art 3?

Council Sec said that they were unable to conclude that the majority of delegations are in favour or against the Cion proposal.

Next Meeting: 14th May (p.m.) to discuss Article 4 and EP amendments in scope.

Meetings thereafter: 3rd June and 25th June.